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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Cyril Mamola III and Rhonda Mamola, husband and wife, Plaintiffs, vs. Group Manufacturing Services, Inc. an Arizona corporation Defendant	Case No.: 2:08-cv-1687-GMS **DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** (Oral Argument Requested)

Defendant Group Manufacturing Services, Inc. ("GMS") pursuant to Fed. R. Civ. P. 56 and Local Rule 1.10 (e) moves for summary judgment on all claims contained in Plaintiffs' Complaint on the grounds there are no genuine issues of material fact regarding any of Plaintiffs' claims and it is entitled to judgment as a matter of law. This motion is supported by the attached Memorandum of Points and Authorities and the separate Statement of Facts and attached exhibits ("SOF") filed herewith.

MEMORANDUM OF POINTS AND AUTHORITIES

Summary of the Argument

This is an employment dispute arising out of Plaintiff Cyril Mamola's (hereinafter referred to singularly as "Plaintiff") discharge for falsifying his 2007 compensation agreement with Group Manufacturing Services (GMS). (SOF #57-61).

All claims arise under federal law: (1) the Americans With Disabilities Act (ADA), 42 U.S.C. §12112; (2) the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2615(a)(1); (3) Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2 ; and (4) the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 207 and 213.

Plaintiff first alleges that, although he was granted FMLA leave in January of 2007, GMS' denial of his request to work from home during that leave violated the "reasonable accommodation" requirement of the ADA. However, the reason for this leave, i.e. surgery to enlarge an eyelid, was not a disability, and even if it could be considered such, GMS' grant of the requested leave of absence constituted a reasonable and effective accommodation.

Plaintiff also claims that GMS' restriction on his driving while on company business following seizures while he drove in 2005 and 2006 constituted unlawful disability discrimination. It did not as a matter of law.

Next, Plaintiff asserts that his discharge for falsifying his compensation agreement turned in upon return from leave was (a) due to exercising FMLA leave rights, or (b) in retaliation for filing an EEOC charge of disability discrimination while on leave. However, Plaintiff cannot establish that he was (1) an "eligible" employee subject to protection under the FMLA, or (2) that GMS' legitimate business reason for his termination was a pretext for discrimination.

Plaintiff further claims the denial of his telecommuting request was sex discrimination, although both males and females at GMS have worked work from home in the past.

Finally, Plaintiff complains that GMS' business driving restrictions following his seizures destroyed his exemption from the overtime requirements of the FLSA. However, the undisputed facts establish that he remained an exempt employee despite these restrictions.

SUMMARY OF FACTS

GMS was incorporated in Arizona in 1987 by Al Singleton. Al and wife Judy originally owned all the stock in the Company. (SOF #1) All of Al's six children worked at GMS at one time or another, and enjoyed the benefits of "family preference." (SOF 2-3).

Plaintiff, who is Al's son-in-law, was hired as a salesman in 1992. (SOF #4). During the 90's, the ownership of the company changed through the adoption of an Employee Stock Ownership Plan (ESOP). (SOF #5). At that point the company was owned by employees. (SOF #6). On September 30, 2003, long-time manager and Board member, Tim Maze, became the company's president. (SOF #7).

On May 9, 2005, Plaintiff suffered severe injuries in a vehicle accident, including the loss of his left eye. (SOF #8). He spent about two weeks in the hospital and a total of three months on approved FMLA leave. (SOF #9). He also required subsequent time off from work for treatment of his injuries during the remainder of his employment. (SOF #10). During 2005 through 2007, GMS granted Plaintiff all time off that he requested to treat his injuries. (SOF # 11)

(i) Plaintiff's Seizure Disorder

On November 23, 2005, Plaintiff had a seizure while driving and caused a traffic accident. (SOF #12). Upon learning of this, Ben Hames notified Plaintiff that he could not drive company vehicles or his own vehicle on company business, and that GMS would arrange transportation when he needed to travel for work. (SOF #13 & 14). Plaintiff's physicians advised him not to drive following this seizure. (SOF #15).

On May 2, 2006, Plaintiff had another seizure while driving, which also resulted in a traffic accident. (SOF #16). On May 6, after consulting with legal counsel, Tim Maze provided Plaintiff with written notice of driving restrictions for company purposes, attaching a copy of Arizona Motor Vehicle Division regulations concerning motorists with seizure disorders. (SOF #17). Although the regulations require an individual suffering a seizure to "cease driving" and report the incident, (SOF #18), Plaintiff never notified Arizona's MVD of his seizures. (SOF #19).

Plaintiff has suffered four seizures since 2005, two while driving. (SOF #20). Plaintiff occasionally arranged for co-workers to provide business transportation, and he never sought to have the driving restrictions lifted by GMS. (SOF #21).

(ii) Plaintiff's FMLA Leave Request and ADA "Reasonable Accommodation"

On October 12, 2006, Plaintiff met with Dr. William McLeish, a plastic surgeon who had reconstructed parts of Plaintiff's face following the May 9 accident. (SOF #22). Because what remained of his left upper eyelid had shrunk, his prosthetic eye had been falling out when he bent over. (SOF #23). Dr. McLeish told him that two-part surgery on this left-upper eyelid would be necessary in order for it to stay in place. (SOF #24 & 25). This surgery was originally scheduled for December 11, 2006, but was delayed because Plaintiff's insurance deemed it cosmetic surgery and initially denied coverage. (SOF #26).

Plaintiff again met with Dr. McLeish on January 4, 2006, regarding the eyelid surgeries. (SOF #27). The first, most serious of the surgeries occurred January 16, 2007, and required a recuperation period of approximately five weeks. (SOF #28).

Plaintiff did not advise GMS of his need for this procedure beforehand. (SOF #29). Instead on January 16, he sent Hames the following email under "Subject: Doctors appointment,"

> Ben, I am sorry to report I am seeing the eye doctor today. Not sure of what is going on, and I will notify you as soon as I can. Thank you, Cy.

(SOF #30).

On Thursday, January 18, 2007, Plaintiff prepared and sent a letter to Hames notifying him "of my need for intermittent leave under the Family and Medical leave Act," and requesting "reasonable accommodation from GMS to allow [him] to work from home." (SOF #31). His telecommuting request covered only the period of Plaintiff's FMLA leave, and did not reference the Americans with Disabilities Act or accommodation upon his return. (SOF #32).

On that Thursday or Friday, without hearing back regarding his telecommuting request, Plaintiff contacted GMS' IT Manager Randy Babchuk and obtained information necessary to log into the company's email server. (SOF #33). He then began making use of his unapproved email access. (SOF #34).

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Upon learning of Plaintiff's actions on Friday, and concerned that Plaintiff sought access to all GMS server data, Tim Maze ordered Babchuk to sever the remote access. (SOF #35). Maze's data security concern was based on prior legal disputes between GMS and Plaintiff's in-laws and wife (SOF#36). Plaintiff's supervisor, Hames, reprimanded Plaintiff for using access from home before it had been approved by GMS. (SOF #37).

The following Monday, January 22, Maze sent Plaintiff an email approving the FMLA request, pending medical certification. (SOF #38). Plaintiff already had a Department of Labor certification form, and returned it to Maze that day. (SOF #39). The following day, Maze sent him a letter stating, in part,

> I have received your doctor's certification regarding your request for intermittent FMLA leave, and this leave request has been granted….. We cannot, however, grant your request that you be allowed to work from home due to a variety of potential problems raised by these kinds of arrangements. A primary concern, of course, is maintaining the security and integrity of company's computer network and data.

(SOF #40). Following Maze's January 23 letter, Plaintiff had no further contact with GMS regarding his telecommuting request. (SOF #41).

(iii) Sex Discrimination Claim

At the time of Plaintiff's telecommuting request, only the company controller had remote access to the company's server, and this was for efficiency purposes rather than due to any illness or injury. (SOF #42).

In the past, Al and Alex Singleton had remote access to the company's data on a full time basis, as did Randy Babchuk. (SOF #43) Temporary remote access had been granted to Plaintiff's sister-in law Carla and former employee Frank Bagdol (SOF #44).

(iv) Plaintiff's Termination

On January 15, the day before his scheduled surgery, Plaintiff met with Hames to receive his annual performance review and 2007 compensation agreement. (SOF #45). He signed the review but asked for several days to look over the one paragraph compensation agreement. (SOF #46).

Plaintiff emailed Hames January 29, asking for a fax copy of his compensation

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agreement because he did not have one. Hames complied. (SOF 47). That same day, Plaintiff travelled to the Equal Employment Opportunity commission office in central Phoenix and filed a charge of discrimination with the EEOC alleging disability discrimination. (SOF #48).

On March 8, Plaintiff submitted a full medical release to return to work, and he returned to work at GMS offices March 12, 2007. (SOF #49). Rather than returning his signed compensation agreement to his supervisor Hames that day, Plaintiff placed it in a company mail slot. (SOF #50). The compensation agreement came into the hands of GMS' human resources manager, Cindy Anderson, who forwarded it to Maze. (SOF #51)

Maze looked at the compensation agreement and wondered, "What is going on here? Because this [a compensation agreement is] not something we just leave out in the open for everybody to see in the mail slots." (SOF #52)

Maze then tried to locate Hames to determine whether or not he had seen the signed agreement. Hames had not. (SOF #53)

Looking at the agreement, Maze noted that Plaintiff signed the agreement and dated it "1/18/ 2007," whereas the fax data information on the document showed the blank form was sent to Plaintiff on January 29, eleven days earlier. (SOF #54).

Maze decided to speak to Plaintiff about the discrepancy. (SOF #55). Although he considered the matter potentially serious, Maze wanted to ask Plaintiff about the date before making any disciplinary decision. (SOF #56)

Prior to meeting with Plaintiff, Maze looked at the company's employee handbook. (SOF #55). GMS' written policy prohibits dishonesty and falsification of a company document and this is within the list of infractions that "may result in immediate termination." (SOF #57).

Maze met with Plaintiff the next morning, March 13, along with Hames and Dan Norton, vice president of operations. (SOF #58). Maze began by showing Plaintiff the signed compensation agreement and asked if Plaintiff if he had signed it on January 18, 2007. Plaintiff said yes. Maze then confronted Plaintiff with the fact that the document had

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been faxed to Plaintiff January 29 and that Plaintiff could not possibly have signed it on January 18th. Plaintiff offered no explanation. (SOF#59)

Based on the falsification of the agreement and Plaintiff's untruthful response to the question of when he signed it, Maze decided to terminate Plaintiff's employment for violation of express company policy. (SOF 60) The reason for the decision is that Maze did not believe he could trust Plaintiff (SOF # 61). Maze was the sole decision maker. (SOF 62).

LEGAL ANALYSIS AND ARGUMENT

I. AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act is comprehensive legislation designed to allow disabled individuals to more fully participate in society for the ultimate benefit of society as a whole. See, 42 U.S.C. § 12101. Plaintiff claims GMS has violated the Act's prohibitions against employment discrimination and retaliation. 42 U.S.C. §§ 12111-12117.

(i) The Surgery Necessitating Plaintiff's Leave Was Not a Disability Pursuant To The ADA

The ADA states that no employer shall "discriminate against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). Included in the definition of discrimination on the basis of disability is "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability …." *Id.* at (b)(5)(A).

Here, Plaintiff's surgery to rebuild his left upper eyelid motivated his request for leave and reasonable accommodation. (SOF #23). The surgery's purpose was to prevent Plaintiff's artificial eye from falling out of its implanted socket. (SOF #24) His telecommuting request covered only the period needed for surgery and recuperation. (SOF #32). Plaintiff returned to work with a full release after two months of leave. (SOF #49).

A temporary injury with minimal residual effects is not a disability within the protection of the ADA. *Sanders v. Arneson Products, Inc*, 91 F.3d 1351, 1354 (9th Cir. 1996). There, the plaintiff suffered from cancer. After cancer surgery, he developed a "psychological reaction" to the disease, and his psychiatrist recommended leave of approximately 10 weeks for treatment. When the plaintiff failed to return to work after that

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time, the employer terminated his employment. The plaintiff claimed that the failure to grant a leave for the entire 15 weeks of treatment violated the ADA's reasonable accommodation requirement. *Id.*

According to the Court. cancer and psychological impairment were two distinct conditions and the issue was whether the latter, which necessitated the leave, was a disability under the ADA:

> Section 12102(2)(A) [of the ADA] defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities of the individual." The term "substantially limits" is defined in 29 CFR § 1630.2(j). Section 1630.2(j)(2) lists three factors to consider in determining whether an individual is substantially limited in a major life activity: "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." … The appendix to the regulations states, "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza." 29 CFR Part 1630 App., § 1630.2(j).

Id. Based on this analysis, the Court held that the plaintiff's temporary psychological impairment with no residual effects following treatment "was not of sufficient duration to fall within the protection of the ADA as a disability." *Id.*; *see also,* EEOC Compliance Manual Section 902.4(d) ("[T]he necessity of surgery, without more, is not sufficient to raise a short-term condition to the level of a disability.")

Plaintiff's surgery in 2007 resulted from his 2005 accident injuries, but was not of sufficient duration to qualify as a disability under the ADA.

(ii) Plaintiff Received Reasonable Accommodation

Even if it is assumed that Plaintiff's telecommuting request was founded on the *basis of his disabilities*, permitting the use of accrued leave is a form of reasonable accommodation when necessitated by an employee's disability. *US Airways, Inc. v. Barnett,* 535 U.S. 391, 400 (2002), see also *Humphrey v. Memorial Hospital Association*, 239 F.3d

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1128, 1135-36 (9th Cir. 2001); *Nunes v. Wal-Mart Stores, Inc*. 164 F.3d 1243 (9th Cir. 1999).

The employer's obligation under the ADA is to grant an accommodation that is reasonable and effective. *Zivkovic v. Southern California Edison Co*., 302 F.3d 1080, 1089 (9th Cir. 2002). It has no obligation to grant the specific accommodation requested by the employee. *Id.*

In this case, Plaintiff requested permission to work from home during FMLA leave. GMS granted leave and denied Plaintiff's request to telecommute during his leave, stating its reasons for the denial. (SOF #31, 32, 38, & 40).

Thereafter, Plaintiff never advised GMS that his leave failed to accommodate his claimed disabilities. (SOF #41). In fact, he took full advantage of it to recuperate and returned to work within two months without restriction. (SOF #49). Plaintiff also never requested any other accommodation following his return to work. As such, Plaintiff was never denied a reasonable accommodation under the ADA and, in fact, received a reasonable accommodation in the form of his requested leave.

(iii) Requiring Compliance with Arizona's Seizure Law Did Not Violate the ADA

It is undisputed that GMS prohibited Plaintiff from driving a vehicle on company business following seizures resulting in traffic accidents. (SOF 12-14). Plaintiff claims this was unlawful disability discrimination.

To establish this claim, Plaintiff must show that (1) Plaintiff's seizure disorder was a disability within the meaning of the ADA, (2) Plaintiff was a qualified individual able to perform the essential functions of his job with or without reasonable accommodation, and (3) Plaintiff suffered an adverse employment action because of his disability. *E.g.*, *Hernandez v. Hughes Missile Systems Co.*, 292 F.3d 1038, 1041 (9th Cir. 2002).

First, a "disability" is a physical or mental impairment that substantially limits one or more major life activities. *Humphrey v. Memorial Hospital Association*, supra at 1133. Driving is not a "major life activity" under the ADA, as the three courts of appeals that have

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published opinions on the question have concluded. *Kellogg v. Energy Safety Services, Inc.*, 544 F.3d 1121 (10th Cir. 2008); *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 643 (2nd Cir. 1998); *Chenoweth v.Hillsborough County*, 250 F.3d 1328, 1329–30 (11th Cir. 2001).

Second, an "adverse employment action" for purposes of a disparate treatment claim must materially affect the terms and conditions of a person's employment. *E.g.*, *Kang v. U. Lim America, Inc.*, 296 F.3d 810 (9th Cir. 2002). GMS made no change to Plaintiff's hours, wages, benefits or other conditions of his employment. (SOF 65). Transportation was made available when he requested it. (SOF #14).

Because Plaintiff cannot establish elements (1) or (3) of a prima face case of disability discrimination, this claim should be dismissed.

(iv) Plaintiff Cannot Prevail Upon His Retaliation Claim Under the ADA

Plaintiff contends that he was fired on March 13, 2007, because he filed an EEOC charge of disability discrimination against the company six weeks earlier on January 29. In order to state a prima facie case of retaliation, Plaintiff must show that (1) he opposed unlawful discrimination, (2) GMS took action "that a reasonable employee would have found ... materially adverse," and (3) a causal nexus exists between the opposition and employer's action. *Burlington Northern & Santa Fe Railway Co. v. White,* 548 U.S. 53 (2006). If a prima facie showing is made, GMS must state a "legitimate non-retaliatory explanation for its [employment] decisions." *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987). GMS has such a reason.

Plaintiff placed the date "1/18/2007" on his compensation agreement representing that he had signed the agreement on that date although he could not physically have done so, and now admits he did not. (SOF #54). However, when GMS' president asked Plaintiff if he signed the agreement on this date, he lied, stating that he signed it on January 18. (SOF #58-59). Because this destroyed Maze's trust in Plaintiff as an employee, Maze then decided to terminate Plaintiff's employment for his violation of express company policy contained in

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the employee handbook. (SOF #57,#60, and #61). Maze was the sole decision maker. (SOF #62).

Accordingly, Plaintiff has the ultimate burden of proving that GMS' reason for his discharge was a pretext for discrimination or unworthy of credence. *E.g.*, *St. Mary's Honor Society v. Hicks*, 509 U.S. 502 (1993). "Although a plaintiff may rely on circumstantial evidence to show pretext, such evidence must be both specific and substantial." *Villiarimo v. Aloha Island Air, Inc.*, supra at 1062. Temporal proximity "provides circumstantial evidence of retaliation that is sufficient to create a prima facie case." *Little v. Windermere Relocation, Inc.,* 265 F.3d 903, 914 (9th Cir. 2003).

But a prima facie case is not enough to meet Plaintiff's ultimate burden unless it is "*combined with sufficient evidence to find that the employer's asserted justification is false…" Id.* at 1063 n.9 (original emphasis), citing, *Reeves v. Sanderson Plumbing Products,* 530 U.S. 133. 147 (2000).

Plaintiff cannot present specific and substantial evidence that Maze's reasons for making the decision to terminate him was merely pretextual.

II. FAMILY AND MEDICAL LEAVE ACT

The Family and Medical Leave Act of 1993 was enacted to balance the needs of employees to take temporary leave for serious medical conditions against "the legitimate interest of employers." 29 U.S.C. §§ 2601(b)(1) and (2). In so doing, it grants eligible employees up to 12 weeks of unpaid leave per year for qualifying conditions and reinstatement upon return from leave. 29 U.S.C. § 2611 (a) (1).

The Act defines an "eligible employee" as one "who has been employed *(i)* for at least 12 months by the employer with respect to whom *leave is requested under section 2612* of this title," and *(ii)* who worked for the employer at least 1250 hours during the 12 months preceding leave. 29 USC § 2611(2). Section 2612 (e) of the Act compels employees to provide their employer with timely notice in order to be an "eligible" employee.

Section 2612's notice obligations requires that the employee provide the employer

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with 30-days advance notice of a need for "foreseeable" leave, *and* "make a reasonable effort to schedule [planned medical] treatment so as not to disrupt unduly the operations of the employer." 29 U.S.C. § 2612(e)(2).

Department of Labor regulations implementing the FMLA state,that "[a]n employee *must* provide the employer at least 30 days advance notice before FMLA leave is to begin if the *need for the leave* is foreseeable based on … planned medical treatment for a serious health condition of the employee," and "When planning medical treatment, the employee *must consult* with the employer and *make a reasonable effort* to schedule the leave so as not to disrupt … operations. 29 C.F.R .825.302 (a) and (e) (emphasis added).

Here, Plaintiff knew of his need for upcoming surgery as early as October 12, 2006. He neither provided timely notice nor made any attempt to schedule leave in consultation with GMS. (SOF #23, 24, 28, 30).

Because of this failure to comply with statutory requirements, Plaintiff cannot pursue this action pursuant to 29 U.S.C. § 215(a)(1), which is solely applicable in a case such as this. *Bachelder v. America West Airlines,* 259 F.3d 1112 (9th Cir. 2001) ("In the case before us and in similar cases [involving employment termination], the issue is one of interference with the exercise of FMLA rights under § 2615(a)(1), not retaliation or discrimination.")

The Eleventh Circuit Court of Appeals has described the reason for required notice as follows:

> The FMLA's notice requirements serve to assist employers in accommodating their employees' absences for certain medical or family reasons…Of course, unforeseen medical emergencies may make advance notice impossible, and in that case, no rights under the FMLA would be lost. At the same time, an employer is entitled to expect that the employee will be cognizant of her own job responsibilities as well as the operations of the employer and will give notice as soon as practicable.

Gay v. Gillman Paper Co. 125 F.3d 1432 (11th Cir. 1997). The Ninth Circuit also recognizes the Act's balance of rights and obligations for both employers and employees.

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Bachelder v. America West Airlines, supra. ("While recognizing employees' need for job security at the times when they most needed time off from work, Congress, in enacting the FMLA, also took employers' legitimate prerogatives into account…"). The Ninth Circuit has also ruled that notice is required under the Act, *id.* at 1130, but has not faced the issue presented in this case, i.e. whether Plaintiff's failure to give *timely* notice bars his FMLA claim. Other courts have, however.

The Seventh Circuit upheld summary judgment against an employee on the grounds that "the FMLA does not provide for leave on short notice when longer notice readily could have been given." *Gilliam v. United Parcel Service,* 233 F.3d 969 (7th Cir. 2000). There, even though the plaintiff requested, and was granted, leave for a qualifying reason (birth of a child), his subsequent claim under the FMLA was dismissed for failure to give required notice. As the Court stated, the plaintiff "knew many months in advance when [his fiance] was likely to deliver their child. Although delivery dates vary around the nine-month norm, the *need* for family leave could be anticipated and notice given." *Id.* at 971. (emphasis added).

Likewise, the Eighth Circuit affirmed summary judgment holding the employer had not violated the FMLA because the plaintiff failed to give timely notice of his need for a medical leave. *Bailey v. Amsted Industries*, Inc., 172 F.3d 1041 (8th Cir. 1999). Because the plaintiff "presented no evidence that he gave 30 days or 'such notice as is practicable' to his employer about his foreseeable absences such as medical appointments,… he has not satisfied the notice requirements of 29 U.S.C. § 2612(e)(2)." *Id.* at 1046.

In *Gay v. Gillman Paper*, *supra*, proper notice of leave had been withheld by the plaintiff. In affirming summary judgment , the Court stated, "When notice of a possible serious medical condition is deliberately withheld and false information is given, it cannot be said that an employee has been terminated in violation of the FMLA." *Id.* at 1436.

Plaintiff knew of his *need for leave* well in advance of his January 16th surgery. (SOF #22, 23). On the day of his surgery, he sent Hames an email denying knowledge of his surgery that day. (SOF #30). His first notice of to GMS of his need for leave was two days

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after surgery. (SOF #31). Under these circumstances, his failure to provide timely notice bars his FMLA claim.

III. SEX DISCRIMINATION

The elements of a prima facie case of Title VII sex discrimination are (1) he belongs to a protected class; (2) he was qualified for the position; (3) he was subjected to an adverse employment action; and (4) similarly situated women were treated more favorably. E.g., *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054 (9th Cir. 2002).

The gravamen of Plaintiff's claim is that GMS allowed females to work from home, and denied his request because he was male. The facts are undisputed, however, that four men and two women worked from home during Plaintiff's employment. (SOF #42-44).

Plaintiff cannot establish a prima facie case because similarly situated women have not received more favorable treatment. Moreover, even if he could, he cannot show that the company's denial of his request was a "pretext for sex discrimination." *Id.*

Simply put, there's no evidence whatsoever that Plaintiff's sex played a role in Maze's decision to deny his request to work from home, or that Maze's express reason for this denial is unworthy of credence. This claim should be dismissed.

IV. FAIR LABOR STANDARDS ACT - OVERTIME

Employees receive overtime premium pay for all hours worked in excess of 40 during a workweek under the FLSA unless otherwise exempt pursuant to 29 U.S.C. § 213 and applicable Department of Labor regulations. *Auer v. Robbins,* 519 U.S. 452 (1997).

It is the employer's burden to show an employee falls within a recognized exemption. *Id.* at 464. Plaintiff claims that when GMS forbade his driving for business purposes on November 28, 2005, it destroyed his status as an exempt "outside salesman" under 29 C.F.R. 541.500-504.

Accepting that premise for this motion, Plaintiff's job duties nevertheless fell within the scope of an exempt "administrative" employee, (SOF #65-66) and his rate of pay also qualified him as an exempt "highly compensated" employee under applicable Department of Labor regulations.

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Both exemptions require that the employee be paid a salary of at least $455 per week. 29 C.F.R. 541.600-601. Plaintiff's salary exceeded that amount during 2006,[1] and he worked no overtime in 2007. (SOF #67).

(i) Administrative Exemption

Under applicable DOL regulations, an "exempt administrative employee" (1) receives the required salary, and is one

> (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. 541.200(a). Plaintiff performed only office, non-manual work. (SOF).

Work directly related to "management or general business operations" includes "purchasing; procurement; [and] marketing…" activities of the employer *or* its customers. *Id.* at 541.201(b) and (c). Again, there is no dispute that Plaintiff's work was part of the purchasing and procurement activities of the company's customers. His work also included purchasing from vendors and direct marketing of GMS products and capabilities. (SOF #63-64).

Plaintiff's exercise of discretion and independent judgment is also demonstrated in his description of his work at GMS. (SOF #64). His duties included negotiation of contract pricing with customers and vendors, formulation of recommendations to management regarding customer proposals and counter-offers, submission of bids under $5000.00 to customers without review, adjustment of designs with company and customer engineers to fit manufacturing processes, and direct quality control. (SOF #64).

(ii) Highly-Compensated Employee

An exempt highly-compensated employee is one "with total annual compensation of at least $100,000…if the employee customarily and regularly performs any one or more of

[1] Plaintiff's FLSA claim covers the two year period before the date the complaint was filed on September 12, 2008. See, 29 U.S.C. § 255(a); *McLaughlin v. Richland Shoe Co.,* 486 U.S. 128, 133 (1988).

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the exempt duties or responsibilities of an executive, administrative or professional employee." 29 C.F.R. 541.601(a). During 2006, Plaintiff received wages of $103,277.01. (SOF #65). During 2007, he did not work more than 40 hours during any workweek. (SOF #66).

As shown above, Plaintiff performed the dual exempt duties of an administrative employee, either of which applies to the "highly compensated" exemption. He also received pay at a rate triggering the exemption during the time he claims the outside sales exemption did not apply.

CONCLUSION

Plaintiff cannot prevail upon his ADA claims because (1) the reason for Plaintiff's leave was not a "disability" under the ADA, (2) GMS' grant of Plaintiff's requested FMLA leave constituted a reasonable and effective accommodation, (3) GMS' driving restrictions neither substantially limited a "major life activity", nor constituted an "adverse employment action," and (4) Plaintiff cannot establish that GMS' legitimate non-discriminatory reason for his termination was a mere pretext for discrimination. Clearly, Plaintiff violated a company policy expressly allowing for immediate termination when he falsified a company document and then lied to Maze when specifically asked about his actions.

Next, Plaintiff cannot prevail upon his FMLA claim because his failure to provide timely notice of his need for leave bars his claim as a matter of law.

Third, there is no evidence whatsoever that supports Plaintiff's claim that his sex played a role in Maze's decision to deny his request to telecommute during FMLA leave.

Finally, Plaintiff cannot prevail upon his claim that he was a non-exempt employee under the FLSA and entitled to overtime pay. In fact, Defendant has conclusively established above that Plaintiff was exempt from the overtime requirements of the FLSA during the relevant time period.

WHEREFORE, based on the foregoing, Group Manufacturing Services, Inc. requests that Plaintiffs' complaint be dismissed with prejudice.

DATED this October 16, 2009

ALLEN LAW FIRM LLC

/s William P. Allen
William P. Allen

SCHMITT, SCHNECK, SMYTH & HERROD, P.C.

/s David T. Maddox
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ORIGINAL e-filed this
16th day of October, 2009, with:

ECF – District Court of Arizona

Copy of the foregoing mailed this
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